Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1123

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

Petitioners,

vs.

NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Respondents pray that this Court deny petitioner's prayer for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered herein on October 10, 1978.

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COUNTER-STATEMENT OF THE CASE

During an investigation into the purchase of parts and tools by employees of respondent Northwest Airlines, Inc. ("Northwest") employed at Newark International Airport, a meeting was held between respondent James O. Singer ("Mr. Singer"), the Newark Station Manager for Northwest, and petitioner Albert M. Gonzalez ("Mr. Gonzalez"). During this meeting a tape recorder was used to record the oral statements of those involved. In the course of said meeting Mr. Gonzalez was unable to explain the purpose of certain purchases of parts and tools in certain transactions where he had signed the pertinent purchase order or invoice or both.

On July 30, 1973 Mr. Gonzalez was discharged by Northwest for the following reason:

> Misuse of company funds whereby you purchased automotive parts, supplies and tools that could not be used on Northwest Airlines' ground equipment, using Northwest Airlines' purchase orders to obtain such items.

On August 1, 1973 Mr. Gonzalez, a member of petitioner International Association of Machinists and Aerospace Workers ("IAMAW") filed a grievance with Singer pursuant to the grievance and arbitration procedures set forth in the applicable collective bargaining agreement between Northwest and IAMAW ("the Mechanics' Agreement"), which grievance challenged Mr. Gonzalez' discharge; on August 14, 1973 Mr. Singer denied the grievance as hearing officer at the first step. On August 25, 1973 Mr. Gonzalez then carried his grievance to the third step pursuant to Article XII(c) of the Mechanics' Agreement (there is no second step provided for in matters involving suspension or discharge). At the third step a one-day hearing was conducted by Edward J. Neppl, Director of Ground Services for Northwest, on September 14, 1973.

On September 20, 1973 defendant Northwest filed a criminal complaint with the authorities which charged petitioner

Gonzalez with taking property under false pretenses, in violation of N.J.S.A. 2A:lll-l; the indictment handed down on January 31, 1974 ultimately charged petitioner Gonzalez with embezzlement in violation of N.J.S.A. 2A:102-5.[1]

Mr. Neppl issued his decision denying the grievance at the third step by a letter dated October 17, 1973.

During the month of October, 1973, respondent Steven D. Wheeler, Esq., Labor Relations Attorney for Northwest, was approached by IAMAW President Charles D. Easley or IAMAW General Chairman Clarence B. Brown, requesting that Northwest allow petitioner Gonzalez to convert his discharge to a resignation. Respondent Wheeler communicated this request to his superiors, Director of Labor Relations James E. Conway and Director of Ground Services Edward J. Neppl. On October 30, 1973 Mr. Neppl advised Mr. Conway that the request of the IAMAW that petitioner Gonzalez be permitted to resign (instead of being discharged) should be granted. This suggestion of Mr. Neppl is contained in an interoffice communication to Mr. Conway dated October 30, 1973. Upon receiving this from Mr. Neppl, respondent Wheeler communicated with IAMAW President Easley and conveyed to him Northwest's willingness to grant the request of the IAMAW to allow petitioner Gonzalez to resign, instead of being discharged. During the early part of November, 1973, respondent Wheeler had conversations with IAMAW General Chairman Brown, repeating Northwest's willingness to accept the IAMAW's earlier request to allow petitioner Gonzalez to resign.[2]

[1] Petitioners argue in their brief that the criminal proceedings and the grievance proceedings were parallel; however, Northwest notes that although the same sets of facts were involved, the presence of elements of the crimes of false pretenses or embezzlement obviously involved issues different from whether or not there was just cause for discharge, the issue being grieved and ultimately arbitrated. Moreover, the standards of proof in the two proceedings were different.

[2] Petitioners' Statement of the Case is in error to the extent it implies that the source of the resignation suggestion was Northwest (See Petition at page 4 thereof).

Following Mr. Neppl's denial of Mr. Gonzalez' grievance at the third step of the grievance procedure and during the period that defendant Wheeler was waiting for IAMAW officials to advise him whether petitioner Gonzalez intended to submit his resignation, the President and General Chairman of the IAMAW submitted the dispute to the NWA-IAMAW System Board of Adjustment by letter dated November 6, 1973. The submission of the dispute by petitioners to the System Board of Adjustment occurred pursuant to the terms of the Mechanics' Agreement, i.e., Article XIII (A), (D), (E) and (G).[3]

On November 6, 1973 Mr. Brown also wrote to petitioner Gonzalez advising him of his opportunity to resign, and further suggesting that Mr. Gonzalez consider whether or not he wished to defer the hearing before the Board until the completion of the criminal proceeding; Mr. Brown also stated that a prompt response "might be important"; after a follow-up letter from Mr. Brown, Mr. Gonzalez finally responded on January 8, 1974, stating that he refused to resign, and that he intended to appear at any hearings, including the hearing before the Board then scheduled for February 14, 1974.

Following the submission of the grievance to the System Board of Adjustment, respondent Wheeler and IAMAW officials, including General Chairman Brown, conferred concerning the selection of a neutral member to hear the grievance for the System Board of Adjustment. Respondent Wheeler and General Chairman Brown agreed that the grievance would be heard on February 14, 1974 in the offices of the mutually-accepted chairman and neutral member of the board, Arbitrator Burton B. Turkus. The agreement to select Mr. Turkus as arbitrator is confirmed by several letters between respondent Wheeler and Arbitrator Turkus and between respondent Wheeler and IAMAW General Chairman Brown or President Easley.

[3] This is essentially arbitration by the IAMAW and Northwest of the grievance of Mr. Gonzalez, pursuant to the Railway Labor Act, 45 U.S.C. §§184 and 153 and pursuant to the provisions of Article XIII of the NWA-IAMAW collective bargaining agreement dated November 24, 1972.

On January 21, 1974 respondent Singer testified before the Essex County Grand Jury. On January 31, 1974 that Grand Jury indicted Mr. Gonzalez for embezzlement.

On or about February 8, 1974, respondent Wheeler received at his office a copy of a letter from IAMAW General Chairman Brown dated February 6, 1974 and directed to Arbitrator Turkus. (See Appendix A hereto). This letter set forth petitioners' request that the Board postpone the arbitration of the grievance from its scheduled date of February 14, 1974, setting forth various reasons for the request: (1) advice of counsel appearing for petitioner Gonzalez in the criminal matter; (2) advice of IAMAW's counsel that it seemed more appropriate to see whether the burden of proof in a criminal proceeding could be met, and (3) a need to conduct certain research and investigation.

Upon receipt of the February 6, 1974 letter from Mr. Brown, defendant Wheeler sent a telegram to Arbitrator Turkus protesting postponement of the arbitration requested by the IAMAW and moving the Board "for a ruling that no claim by the grievants for back wages or benefits [will] be valid or collectible for the period after February 14, 1974." (See Appendix B hereto)[4] Subsequent to the receipt of Mr. Brown's letter of February 6, 1974 and respondent Wheeler's telegram of February 8, 1974, Arbitrator Turkus sent a letter dated February 11, 1974, granting the IAMAW's request for postponement of the arbitration *sine die*. The letter did not refer to respondent Northwest's position as to limitation of back pay.

Following the postponement of the arbitration proceedings at the request of the petitioner IAMAW, Mr. Wheeler wrote a letter to IAMAW General Chairman Brown stating that respondent Northwest was available to present its case before Arbitrator Turkus on several dates in March and April, 1974. Mr. Brown replied "belatedly" that he would forward Mr. Wheeler's letter to petitioner Gonzalez. Respondent Wheeler

[4] While the text of the telegram contained a typographical error stating the year as 1973, the context makes it clear that 1974 was intended.

received no further response to his request to proceed with arbitration.

Also following the postponement of arbitration, respondent Wheeler had several discussions with IAMAW General Chairman Brown, in which Mr. Brown agreed that Arbitrator Turkus would retain jurisdiction over the grievance of petitioner Gonzalez and took the position that Mr. Turkus would be presented with said grievance upon resolution of the criminal charges pending against petitioner Gonzalez in the state courts of New Jersey. However, respondent Northwest did not abandon its position that the arbitration should proceed as soon as possible. Indeed the notations on the docket sheet prepared by the IAMAW show that the IAMAW's contrary position was the cause of the delay of proceedings before the Board.

By letter of December 2, 1974, Arbitrator Turkus inquired as to the status of the grievance of petitioner Gonzalez. Mr. Wheeler replied to Arbitrator Turkus in a letter dated December 10, 1974 that respondent Northwest was prepared to proceed to arbitration and that the arbitration process was not abandoned in any way. IAMAW General Chairman Brown wrote to Arbitrator Turkus in a letter dated December 17, 1974 that the IAMAW preferred to hold the grievance of petitioner Gonzalez in abeyance until all criminal charges against petitioner Gonzalez had been resolved. Further correspondence in April and June of 1975 reflects that the desire of Northwest to pursue arbitration and the desire of petitioner to delay arbitration both remained unchanged.[5]

In late May or early June, 1975, respondent Wheeler was notified by Essex County Assistant Prosecutor Barry Siegel that the criminal prosecution of plaintiff Gonzalez was scheduled for trial in late June, 1975. The trial later was postponed and reset for September 8, 1975. Prosecutor Siegel advised Mr. Wheeler that he wished defendant Wheeler to assist him in preparing the criminal prosecution by coordinating the availability of wit-

[5] Indeed the Board's opinion incorporates a finding that respondent Northwest was "ready to proceed with the arbitration".

nesses that might testify at trial. Mr. Wheeler agreed to assist Assistant Prosecutor Siegel and therefore traveled to Newark, New Jersey on or about September 7, 1975, assisting the Prosecutor during the trial.

Following the acquittal of petitioner Gonzalez on September 19, 1975, Mr. Wheeler contacted IAMAW General Chairman Brown concerning the scheduling of Mr. Gonzalez' grievance before Arbitrator Turkus. Defendant Wheeler also had a telephone conversation with IAMAW President Easley in late November or early December of 1975, wherein Mr. Easley agreed to proceed with Mr. Gonzalez' grievance before the Board of Arbitration chaired by Mr. Turkus. Before certain scheduling problems could be overcome, Union President Easley advised Northwest on January 21, 1976 that the IAMAW would not be ready to proceed before the Board until there was "no further prospect of court or legal action of any sort relative to Mr. Gonzalez."

On January 26, 1976 the instant suit was filed.

Petitioner Gonzalez and IAMAW filed the instant suit against Northwest and several employees of Northwest, namely, James O. Singer, James A. Abbott, Robert Ebert and Steven D. Wheeler.[6] Plaintiffs sought, *inter alia,* (1) a permanent injunction against arbitration before the System Board of Adjustment of the grievance arising out of the discharge of Mr. Gonzalez, (2) immediate reinstatement of Mr. Gonzalez, and (3) compensatory and punitive damages for alleged deprivation of the civil rights of Mr. Gonzalez, for alleged deprivation of the Seventh and Fourteenth Amendment rights of Mr. Gonzalez, for alleged malicious prosecution of Mr. Gonzalez and for alleged defamation of Mr. Gonzalez.[7]

[6] As the four individual defendants have no direct interest in the matter before this court, further references to them have been minimized.

[7] Petitioners since have sought to add a count charging respondents with negligent management.

By Order to Show Cause also filed on January 26, 1976, petitioners also sought a preliminary injunction against the arbitration of Mr. Gonzalez's grievance, which grievance had been submitted by petitioners to the System Board of Adjustment by letter dated November 6, 1973. A hearing concerning the Order to Show Cause seeking the preliminary injunction was had before the Honorable Frederick B. Lacey on March 2, 1976, and a rehearing was held on March 16, 1976. Petitioners sought in their application for a preliminary injunction, *inter alia:* (a) immediate reinstatement of Mr. Gonzalez as Crew Chief of the Plant Maintenance Department at the Newark Station of Northwest with full seniority and welfare rights dating back to his first date of employment with Northwest; (b) an injunction against any arbitration proceeding based on the same factual circumstances concerning which a verdict of not guilty was rendered in the criminal trial of *State of New Jersey v. Albert M. Gonzalez;* and (c) alternatively, immediate but provisional reinstatement of Mr. Gonzalez as Crew Chief of the Plant Maintenance Department at the Newark Station of Northwest, pending the decision of the Arbitrator under the provisions of the Agreement between Northwest and the IAMAW and the confirmation or vacation by the district court of any arbitration award made as the result of such hearing. Petitioners' application for injunctive relief was denied in its entirety by the District Court in an Order filed June 3, 1976. Said Order explicitly directed that the grievance filed by the petitioners concerning the discharge of Mr. Gonzalez proceed immediately to arbitration before the NWA-IAMAW System Board of Adjustment in accordance with the provisions of the Mechanics' Agreement in existence on July 30, 1973, the date of Mr. Gonzalez's discharge. Arbitration actually commenced on May 3, 1976, prior to the entry of the Order formally directing arbitration.

At the first day of the hearings before the Board, counsel for the petitioners and counsel for Northwest stipulated that the proceedings before the Board were "without prejudice to the allegations Mr. Gonzalez has made in [his] complaint".

The award of the NWA-IAMAW System Board of Adjustment was rendered on January 17, 1977. This award reinstated Mr. Gonzalez to employment on or before January 24, 1977 without loss of seniority, but with back pay only from July 30, 1973 until March 15, 1974. Petitioners endorsed the award insofar as it reinstated Mr. Gonzalez, but objected to the money portion of that award. The Board had concluded that the "unduly excessive" delay in proceeding to arbitration could not be charged to Northwest (See Petitioners' Appendix at page A15), and that granting full back pay for the period which had elapsed between the discharge and reinstatement might allow Gonzalez to profit unfairly at the expense of Northwest (See Petitioners Appendix at page A14). Accordingly, the Board limited back pay to the period from his discharge on July 30, 1973 to March 15, 1974, the date on which the Board found the arbitration could have been decided had it proceeded to hearing as scheduled on February 14, 1974. (See Petitioners' Appendix at page A15).[8]

Petitioners accepted that portion of the award that reinstated Mr. Gonzalez to his employment at Northwest. However, petitioners brought a motion before the District Court on April 18, 1977 to upset the money portion of the same award so as to recover back pay for the entire period of the delay, and for certain ancillary relief pursuant to the Railway Labor Act, specifically 45 U.S.C. §153 First (q). The District Court after argument delivered an oral opinion (see Appendix B to Petition for Certiorari), denying all of the relief sought by petitioners, thus affirming the award entered by the System Board of Adjustment in its entirety. Said denial was reflected in the Order and Final Judgment filed in this matter on December 6, 1977 (see Petitioners' Appendix C).

A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed by petitioner on January 5, 1978 as to the denial of relief and the concomitant affirmance of the

[8] Indeed in their post-arbitration brief petitioners themselves hypothesized that a decision would have issued by April 30, 1974.

Board's award "in all respects." On October 10, 1978, the Third Circuit Court of Appeals affirmed the decision of the District Court without opinion.

REASONS FOR DENYING THE WRIT

I. Mr. Gonzalez' Rights under the Self Incrimination Clause Were Not Violated by the System Board of Adjustment.

Petitioners argue that Mr. Gonzalez' exercise of constitutional rights under the self-incrimination and due process clauses of the Fifth Amendment was penalized by the Board's limitation of back pay during the period attributable to the adjournment of the arbitration proceedings sought by Mr. Gonzalez. In the lower courts petitioners also argued that the Award was not "conclusive" within the meaning of pertinent provisions of the Railway Labor Act, because the statutory standards for vacating the Award under 45 U.S.C. §153 First (q) were applicable.[9] Petitioners have not sought to press these arguments in their Petition, although the Petition does contain certain references to the irrationality of the limitation of back pay, and therefore the Award is entitled to the binding effect usually accorded such arbitration awards, *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), unless a valid constitutional attack on the proceedings

[9] 45 U.S.C. §153 First (q) states in pertinent part:

> On [judicial review] the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of [the Railway Labor Act], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

before the Board can be made. *Union Pacific R. Co.* v. *Price, supra*, 360 U.S. at 616.

Petitioners argue primarily that the Board's award is constitutionally invalid in that it allegedly constituted the "automatic imposition" of a penalty upon petitioner Gonzalez for exercising his privilege against self-incrimination (See Petition at page 11). Petitioners articulate this argument for the first time in their Petition; in the courts below the alleged automatic burden was the threat that the arbitrator would draw adverse inferences from the failure to testify at the hearing. Respondents respectfully submit that this Court should not entertain this new argument as the lower courts have not had an opportunity to address it.

Considering first the factual inadequacies of this argument, this invocation of the privilege is in fact an afterthought on the part of petitioners; in their February 6, 1974 request for postponement of the arbitration hearing, no mention was made of any desire to avoid self-incrimination (See Appendix A to this brief).[10] Moreover, Mr. Gonzalez never proceeded to a stage in either the criminal or arbitration proceeding at which he was faced with the choice of asserting his Fifth Amendement privilege, and in fact never claimed such privilege in either proceeding, testifying fully and freely in both. Thus it appears that when Mr. Gonzalez through the IAMAW unilaterally demanded adjournment of arbitration before the criminal trial began and until it ended, it was motivated by other factors, such as convenience, conservation of resources and strategy. In spite of this unilateral delay, obtained over Northwest's explicit

[10] While the Board did find that the purpose of the adjournment was to avoid "the possibility of [Mr. Gonzalez'] testimony at the arbitration being used against him in the criminal case," this decision well may have been motivated by strategic considerations, such as a desire on the part of Mr. Gonzalez to conceal his factual defenses (explanations, alibis, etc.) until the criminal trial, rather than by any desire to avoid self-incrimination. Thus petitioners' entire constitutional argument is based on an alleged "exercise" of the privilege which is not clearly discernible in the relevant document, *i.e.* the letter of February 6, 1974.

objection regarding back pay, petitioners argue that Northwest should pay an immensely increased back-pay award to Mr. Gonzalez.

Furthermore it must be emphasized that Mr. Gonzalez' alleged "exercise" of the privilege was not the usual exercise of the privilege; for Mr. Gonzalez did not take the stand at the arbitration hearing and then invoke the privilege in response to those questions, if any, whose answers might have tended to incriminate him. Rather Mr. Gonzalez' "exercise", assuming *arguendo* that the February 6, 1974 letter was motivated by a desire to avoid self-incrimination, was really no more than an effort to secure a ruling that would preclude his having to make the decision of whether or not to exercise his privilege in the usual manner described above. Thus respondents submit that the alleged "exercise" was not in fact an exercise at all, and should not be the basis for the constitutional arguments raised by petitioners.

The most basic flaw in petitioners' reasoning is that they cannot demonstrate that any penalty (threatened or imposed) was automatic from a factual standpoint. First, a grievant's failure to testify at arbitration does not automatically result in the arbitrator's drawing an inference of grievant's guilt. Indeed Chairman Turkus commented in the award that plaintiff Gonzalez acted "wisely" in requesting a postponement so as to avoid "the possibility of his testimony at the arbitration being used against him in the criminal case." (See Appendix A to Petition at page A14). Presumably Chairman Turkus would have found the same avoidance of the possibility "wise" had the hearing proceeded in February, 1974 as scheduled and had plaintiff in fact exercised his privilege; thus there is little basis for arguing that a proper exercise of the Fifth Amendment privilege would have been fatal to plaintiff's attempt to overturn his discharge. If anything the award seems to state that Arbitrator Turkus would have understood the reasons for the exercise, and it is possible that the petitioner might not even have suffered the "burden" of an adverse inference being drawn against him. Thus petitioner not only cannot demonstrate that an automatic penalty in that regard was imminent,

he cannot even demonstrate that any penalty was probable. Second, the ultimate limitation of back pay was not "automatic", but reflected the arbitrator's balancing of the equities of both parties, a balancing which might well yield different results in different circumstances, and a balancing which is entitled to conclusive weight absent a finding that the standards for vacating the award contained in 45 U.S.C. §153 First (q) are met. *Union Pacific R. Co.* v. *Price, supra.* For example, petitioners seek this increased back-pay award even though Arbitrator Turkus found that Mr. Gonzalez attempted to profit at Northwest's expense by delaying the arbitration and increasing damages by self-interest and inordinate delay. See Appendix A to Petition at page A14. Thus the factual context within which petitioners make their constitutional arguments bears little relationship to that which one would expect to underlie such arguments, and renders the question presented in the Petition inapposite from a factual standpoint.

Turning to the legal aspects of petitioners' arguments, petitioners seek to persuade this Court to grant *certiorari* by arguing that there is "no reported decision on point," and that the lower courts seriously misinterpreted this Court's holding in *United States v. Kordel,* 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed. 2d 1, (1970). Respondents respectfully submit that these legal arguments too are misguided. First, while there is no prior decision of this Court in any case whose precise factual pattern matches the one at bar, prior decisions of this Court have expounded at length upon the principles one is to apply in determining whether or not a given burden placed upon one's exercise of the Fifth Amendment privilege against self-incrimination is constitutionally impermissible. Indeed the decisions in this area are uniform in their conclusion that in a civil context (such as the arbitration proceedings under attack here), only those penalties which are automatic upon assertion of the privilege and are capable of coercive effect are invalid. See, *e.g., Garrity v. State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967) where police officers had been compelled to testify at the risk of incriminating themselves in

order to avoid forfeiture of their job by virtue of a New Jersey statute providing for job forfeiture upon mere refusal to testify or invocation of the privilege against self-incrimination. *See also, Slochower v. Board of Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956) where the Court held that mere invocation of the privilege before a congressional committee could not be the sole basis for discharge; *Spevack v. Klein,* 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967), where the Court held mere refusal to testify by reason of the privilege could not support disbarment; and *Gardner v. Broderick,* 392 U.S. 273, 88 S. Ct. 1913, 20 L.Ed.2d 1082 (1968), where the Court held mere refusal to waive his entitlement to immunity upon invoking the privilege could not justify discharge of a police officer pursuant to provisions of the New York City Charter.

While the foregoing cases have uniformly struck down as constitutionally impermissible clearly coercive burdens flowing automatically from the mere exercise of the privilege, this Court has stated clearly that less coercive burdens may be constitutionally permissible even if automatic. Moreover, if the burden is not automatic, the relationship between the exercise and the burden is too weak to bespeak coercion. Thus in *Baxter v. Palmigiano,* 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed. 2d 810 (1976) this Court ruled that the mere drawing of an adverse inference from the silence that results from invocation of the privilege is not constitutionally impermissible in a civil, as opposed to criminal, context. Distinguishing the *Garrity* line of decisions in reaching the *Baxter* decision, this Court stated:

> There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value then was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the

exercise of the privilege. . . .The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent. . . .

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a *civil cause.*" [Emphasis in text; p. 319]

Thus the prior decisions of this Court make clear that only substantial and coercive burdens (*e.g.*, discharges) resulting automatically from the mere exercise of the privilege are impermissible, and that lesser burdens such as the drawing of adverse inferences will be permitted even if automatic so long as not overly coercive.

Indeed respondents respectfully submit that lower courts are not having any difficulty in applying the teachings of the foregoing cases to situations involving simultaneous civil and criminal proceedings arising from the same set of facts. Thus in *DeVita v. Sills,* 422 F.2d 1172 (3rd Cir. 1970), the plaintiff judge sought an adjournment of a civil disciplinary proceeding against him until the completion of a criminal prosecution against him arising out of the same facts. Rather than continue with the civil proceeding and risk the chance that he would have to assert his Fifth Amendment privilege in order not to incriminate himself, Judge DeVita, like petitioner Gonzalez, sought an adjournment of the entire civil proceeding until the outcome of the criminal trial. The Third Circuit held this argument specious and ordered the judge to go forward in the civil disciplinary proceeding.

"But, says the plaintiff, I will nevertheless be put to a difficult situation, and the Fifth Amendment should be so construed that one is not faced with the compulsion to add his own possibly affirmative good impression to weight of

evidence in the disciplinary hearing before the criminal trial." [422 F.2d at 1178]

The Court of Appeals gave no credence to this argument, even though it involved possible suspension of a judge of this state, his possible removal from the bench and possible disbarment, with consequent effects on his property. The Third Circuit's response to such reasoning was:

"*This argument proves too much, for it applies with equal force to every situation where civil and criminal proceedings may arise out of the same factual pattern.* If, for example, the charge against an attorney was embezzlement of a client's funds, acceptance of plaintiff's position would require that the wronged client await the completion of a criminal trial before he sought a civil recovery, because of the possible compulsion of the risk of a judgment. The same would be true of every defendant in a wrongful death action; of many taxpayers; of most antitrust defendants. . . *No authority has come to our attention for so broad a reading of the Fifth Amendment, and the countervailing possibilities of prejudice to civil litigants militates against any such extension of constitutional doctrine.*" [422 F.2d at 1178; emphasis supplied]

The contention that an actual or potential defendant in a criminal case should not even be put to a difficult choice of having to assert the privilege in a related civil case had been earlier rejected by the United States Supreme Court in *United States v. Kordel,* 397 U.S. 1, 90 S. Ct. 763, 25 L.Ed. 2d 1 (1970), reversing the lower court:

"In this analysis we think the court erred, for Feldten need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination. Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own, or because the proceeding in which the Government sought

information was civil rather than criminal in character." [90 S.Ct. at 767]

The Third Circuit in *DeVita v. Sills, supra,* reached the same result as this Court in *Kordel,* stating that the plaintiff could, if he wanted, assert the privilege in the civil proceeding but that "he has no constitutional right to be relieved of the burden of that choice." *DeVita v. Sills, supra* , 422 F.2d at 1180.

In *Driver v. Helms,* 402 F. Supp. 683, 685-686 (D.R.I. 1975), the court held that even though certain of the defendants were subjects of a criminal investigation, the court would not stay the civil proceedings against defendants based on the same facts, despite allegations that some defendants might assert their Fifth Amendment protections:

> "[the defendants] can, of course, object to depositions or interrogatories directed against them in any civil action where the answers might incriminate [them] in a pending criminal case. . .But the contention that an actual or potential defendant in a criminal case should not even be put to the difficult choice of having to assert the privilege in a related civil case was rejected in *United States v. Kordel,* 397 U.S. 1 (1970)."

So too in *S.E.C. v. Gilbert,* 79 F.R.D. 683 (S.D.N.Y. 1978) the court in a civil context considered a defendant's right to a protective order until the termination of a parallel criminal proceeding, and ultimately denied such relief, holding that the mere possibility of raising an adverse inference did not constitute the kind of burden which the Supreme Court previously had invalidated:

> Accordingly, we conclude that as long as the only immediate sanction for refusal to testify is, as here, the possible raising of an adverse inference which would not, standing alone, support a finding of liability, then the spectre of loss of employment, which even a finding of liability would not automatically cause, does not put Streicher to an unconstitutionally coercive choice. [79 F.R.D. at p. 686]

The issue of the effect of the privilege upon a request for the adjournment of a civil proceeding until the conclusion of a criminal trial involving the same facts has been treated recently by the New Jersey courts in *Shaw v. Riverdell Hospital,* 150 N.J. Super. 585 (Law Div. 1977). Defendants there sought to have the civil case placed on the inactive list pending the outcome of the related criminal matter. The defendant physician argued that, if the civil action were to proceed prior to a final disposition of the criminal case, an unconstitutional burden would be placed upon his exercise of his privilege against self-incrimination under the Fifth Amendment. The court denied the defendant physician's motion to adjourn the civil proceedings pending the outcome of the criminal trial, and offered several reasons for its decision. Initially, the court observed that, as here, neither the criminal nor the civil trial had yet progressed to the point where the defendant was required to decide whether or not to assert his Fifth Amendment privilege. Consequently, the court found that the defendant's motion to stay the civil litigation was prematurely filed. The court also stated that the privilege against self-incrimination is not infringed, nor too high a price exacted for its exercise, when a criminal defendant is put to a difficult choice of whether or not to assert the privilege in a related civil case. The court further stated that its reason for refusing to stay the civil litigation was not to intentionally curtail the exercise of the defendant's rights against compulsory self-incrimination, but rather to insure that substantial justice was effected and that plaintiffs there be given their day in court without further inordinate delay. Thus, the court's decision emanated from an attempt to effect substantial justice among all the litigants:

> "Hence, any pressure brought to bear as a result thereof will be sufficiently attenuated so as not to be an unconstitutional penalty in that it served a purpose other than simply to discourage the defendant from exercising his constitutional right. [150 N.J. Super. at 590]

Finally, in *Ott v. Board of Education of Hamilton Township,* 160 N.J. Super. 333 (App. Div. 1978) the New Jersey court addressed the right of a teacher, who sought to enjoin disciplinary proceedings against him pending the resolution of parallel criminal proceedings, to receive his salary during the period of the injunction. The court granted an injunction under its equitable powers, and denied the salary during the period of the injunction, relying in part on basic equitable principles:

> In view of this expression of legislative intent and the application of basic equitable principles, we conclude that plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. *Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed.* A contrary conclusion would reward him with receipt of salary without service during the pendency of the criminal charge and the potential extensive delay in its disposition. In the absence of such criminal involvement, on the other hand, the board could suspend his salary for 120 days within which the Commissioner would be able to dispose of the charge. Plaintiff should not be in a better position because the infraction involves a crime than that which would obtain if the charge were noncriminal. *Since the delay is brought about by him and his interest, the board should not be burdened with interim salary payments.* Of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary.[11]

What is clear from the foregoing analysis is that the guidance given by this Court in the *Garrity* line of decisions and the *Baxter* decision has proved a workable framework for analysis of what is a constitutionally permissible burden in this context.

[11] This final statement, although *dictum,* was mandated by a New Jersey statute which appeared to require payment of full back salary to a reinstated teacher.

Thus it is apparent that petitioners are not in a position to make the factual showing required under prior decisions. Not only did Mr. Gonzalez not "exercise" the privilege, but he cannot demonstrate that the burden was imposed automatically, because the limitation of back pay here was the result of Board's proper exercise of its discretion in balancing the equities of the litigants. Furthermore, the attenuated relationship between any exercise of the privilege and the ultimate limitation of back pay renders it unlikely that the threat of the limitation would coerce any grievant to waive the privilege. Finally, petitioners are not even in a position to argue that the law is unclear or confused. Under all the circumstances, petitioners' questions regarding the self incrimination clause are neither substantial nor novel.

2. Mr. Gonzalez' Rights Under The Due Process Clause Were Not Violated by the System Board of Adjustment.

While petitioners have not articulated clearly their claims with respect to Mr. Gonzalez' rights under the due process clause of the Fifth Amendment, it appears that the argument is principally based on somewhat vague concepts of fundamental fairness. Thus petitioners state: (1) that the imposition of such a penalty where the civil proceeding is one in which discovery is unavailable somehow contravenes due process (See Petition at page 11); (2) that the imposition of a penalty for seeking and obtaining an adjournment to avoid obvious prejudice to Mr. Gonzalez' constitutional rights is inconsistent with the body of law that supports one's entitlement to the adjournment (See Petition at page 12); (3) that this penalty will have a chilling effect on the ability of employees to protect their property rights in employment (See Petition at page 13); (4) that this penalty will have a chilling effect on the ability of union representatives to investigate such matters as this (See Petition at page 13); and (5) that since a conviction would have mooted the necessity for the arbitration, fairness requires that the acquittal in those proceedings entitles the petitioner to full back pay (See Petition at page 14).

Assuming that the foregoing arguments are intended to state bases for finding the penalty invalid that are different from the analysis which petitioners offer under the self-incrimination clause[12], respondents respectfully submit that these arguments do not rise to constitutional dimension. In the absence of questions of constitutional dimension, as was stated above, the Railway Labor Act requires that the Award be conclusive as between the parties on such issues as were addressed by the Board.

Preliminarily it must be noted that the concept of due process is a flexible one which depends on the nature of the deprivation and policy considerations related to the proceedings leading up to the deprivation. Thus while the authority cited by petitioners has accorded certain due process rights in certain narrow circumstances, *e.g., Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972), the final determination of what process is "due" in given circumstances must depend on individualized analysis of the foregoing factors.[13] Therefore it is most unlikely that this case will provide any meaningful precedent for future arbitrators faced with the task of balancing equities.

Petitioners argue that the fact that the Board has "no formal rules of procedure to compel discovery of testimony or documents" enhanced the pressures on Mr. Gonzalez to testify before the Board.[14] While petitioners raise this argument for

[12] Even if this is not so, this Court in *Baxter v. Palmigiano, supra,* already has rejected the due process argument that is based on essentially the same analysis.

[13] Petitioners' citation of *Patrick v. Esso Standard Oil Company,* 156 F.Supp. 336 (D.N.J. 1957) and *Peper v. Princeton University Board of Trustees,* 77 N.J. 55 (1978) is inappropriate, as any constitutional dimension accorded employment in those cases was under the New Jersey, not federal constitution.

[14] Petitioners also argue in support of this point that this Court should grant *certiorari* because the employee is usually represented by a union agent untrained in law. While respondents disagree that there is any inbalance in representation, this is not a proper case to address such issues, as Mr. Gonzalez has been represented at the criminal trial, the arbitration and in his civil action by counsel prosecuting this very Petition.

the first time in this Court, it seems clear that the need for economical and speedy resolution of labor disputes in the transportation industry, which need underlies the entire legislative establishment of special mechanisms in this area, clearly justifies depriving the parties of certain discovery techniques. Petitioners here retained several procedural advantages which would have mitigated the impact of the absence of discovery: (a) the burden of proof and of going forward were both placed on Northwest during the proceedings before the Board; (b) pursuant to certain provisions of the Mechanics' Agreement the Chairman of the Board is obligated to "guide the parties in the presentation of testimony, exhibits and arguments at hearings to the end that a fair, prompt and orderly hearing of the dispute is afforded";[15] (c) the parties have the right to "call any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party;"[16] and (d) petitioners were accorded a full hearing on this matter, including an opportunity to cross-examine Northwest's witnesses and to take depositions of third party witnesses. Quite clearly the procedural protections afforded Mr. Gonzalez would have permitted him to maintain a defense without his testifying on matters that might incriminate him.

As to petitioners' contention that the limitation of back pay is somehow inconsistent with the granting of the adjournment, it must be emphasized first of all that the risk of such a limitation where a grievant delays a proceeding is well established in published arbitral decisions. Indeed, arbitrators often have limited back pay awards where delay in arbitration has occurred. See, *e.g., In re Jacuzzi Brothers, Inc.,* 49 L.A. 761 (1967) where a union requested suspension of all arbitration proceedings during (1) collective bargaining and (2) a several month long strike, and where there was a post-strike delay by the union in reviewing the grievance to decide whether to proceed to arbitration. See also *In re Millage Produce, Inc.,* 45 L.A. 211 (1965) where an arbitrator limited back pay in the

[15] Mechanics' Agreement, Article XIII (F).

[16] Mechanics' Agreement, Article XIII (I).

face of the unexplained delay of the parties in proceeding to arbitration. Similar decisions limiting back pay exist where there is a delay in filing a grievance by the grievant or the union, a situation analogous to delay in arbitration. *In re Colgate Palmolive Co.*, 64 L.A. 293 (1975); *In re Maintenance Service Corp.*, 64 L.A. 978 (1975); *In re Steel Warehouse Company, Inc.* 45 L.A. 357 (1965); and *In re Fawn Engineering Co.*, 42 L.A. 1185 (1964). Furthermore, as the Board and the District Court noted in this matter, and as noted by the New Jersey Courts in the *Ott* case, *supra*, fairness demands that the burden engendered by a delay should be borne by the one seeking the adjournment. While petitioners doubtless would counter with the argument that an adjournment would not have been necessary without Northwest's initiation of criminal proceedings, the public policy of New Jersey favoring the filing of criminal charges when probable cause exists would seem to preclude such an argument. *Lind v. Schmid*, 67 N.J. 255, 262 (1975).

Petitioners' arguments regarding the possible chilling effects of the award below also are misguided. While the practical effect of the ruling below may be to make it more difficult for one to defend oneself in disciplinary or arbitral proceedings, it would not seem likely to discourage employees altogether from attempting to preserve their employment. On the other hand, the ruling limiting back pay confers on the employer what it is fairly entitled to, namely, relief from burdensome back pay awards in a civil context where the employee seeks an adjournment for his protection in the criminal forum and is thus the true beneficiary of the delay. Indeed the logical extension of petitioners' argument is that any employee who seeks to justify an adjournment by reason of his privilege is entitled automatically to full back pay. In practice such a rule of law would permit any employee to obtain a huge back pay award, even where the real motivation for seeking the adjournment lay far from the Fifth Amendment. Such an effect would be most inequitable and would deprive the employer of fundamental fairness. Thus no fixed principle is appropriate in

this area, the arbitration forum being capable of determining what is equitable on a case by case basis.

As to petitioners' argument that the ruling would have a chilling effect on the ability of a union to appropriately investigate matters, respondent Northwest submits that this tenuous argument was not raised in the District Court and should not be entertained on appeal, absent exceptional circumstances. In any event this argument is clearly frivolous. First, the request for an opportunity to investigate the factual background of the grievance was made on February 6, 1974, more than five months after the grievance was filed. Certainly a limitation of back pay where a union has delayed its investigation for so many months would not chill any union timely moving to satisfy its investigatory obligation imposed under *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed. 2d 231 (1976). Indeed it would seem wise for this Court to endorse the concept of limiting back pay in the face of such delay, so as to create an incentive for unions to investigate promptly. Moreover, the duty to investigate under *Hines* exists regardless of the pendency of criminal proceedings. Finally, reasonable and timely postponements in order to investigate presumably would not be penalized by arbitrators.

Finally, citing *Local 453, I.U.E. v. Otis Elevator Co.*, 201 F.Supp. 213 (E.D.N.Y. 1962), petitioners argue that Northwest had much to gain from a criminal conviction, as this would render arbitration unnecessary as a matter of public policy, and further argue that fairness thus requires full back pay after acquittal. However, these arguments do not square with the facts, because Northwest constantly pressed for arbitration *prior* to the criminal trial of plaintiffs. Northwest repeatedly sought arbitration more than 19 months before plaintiff's criminal trial began, and continued to press for arbitration up to the time of the criminal trial. Certainly, if defendant Northwest stood to benefit so extensively from the criminal trial, then it would have agreed with plaintiffs to postpone arbitration until after the criminal proceedings. The opposite occurred, with petitioners

requesting the adjournment to see if the criminal standard of proof might be met. See Appendix A hereto. This pressure by defendant Northwest for arbitration as early as possible, and before the criminal trial, in order to resolve the labor dispute is irrefutable proof that defendant Northwest was not seeking any ulterior advantage from filing criminal proceedings against plaintiff Gonzalez.[17] In any event the advent of the Speedy Trial Act and its state law analogs to a large extent will prevent any employer from seeking such an advantage in the future.

Thus respondents respectfully submit that petitioners' rights to due process under the Fifth Amendment were in no way infringed by the imposition of the limitation of back pay. The limitation itself not only is consistent with fundamental fairness, but it reflects the Arbitrator's well supported finding that under all circumstances, the delay was attributable to plaintiff, and his further conclusion that it would be inequitable as a matter of law to visit the burdens engendered by this delay upon respondents. There being no unconstitutional deprivation of Mr. Gonzalez' due process rights, this Court should not disturb the decision of the Board.

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[17] Petitioners also cite the decision in *Holodnak v. Avco-Lycoming Div., Stratford,* 514 F.2d 285 (2nd Cir. 1975) as authority for the proposition that anything less then full back pay is inappropriate. This argument puts the cart before the horse, for as petitioners themselves state, that decision followed a finding that the employer had deprived the employee of *constitutional* rights, which finding was not part of the *ratio decidendi;* of the Board in this case.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari in this matter be denied.

Respectfully submitted,

STRYKER, TAMS & DILL

By /s/ JOHN C. LIFLAND

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Attorneys for Respondents

Dated: February 16, 1979

On the Brief:
CHRISTOPHER H. MILTON, ESQ.

APPENDIX A

NORTHWEST DISTRICT LODGE NO. 143

International Association of Machinists and Aerospace Workers
AFL-CIO

4301 EAST 50TH STREET • MINNEAPOLIS, MINN. 55417

February 6, 1974

MR. BURTON B. TURKUS
595 Madison Avenue
New York, New York 10022

RE: Grievance #A1808, Dkt. 73-23, Charles Barbossa
Grievance #10394, Dkt. 73-22, Albert Gonzalez

Dear Mr. Turkus:

According to Charles Barbossa and Albert Gonzalez, individual and separate legal counsel for each has advised them to postpone System Board of Adjustment hearings until court action relative to them has been processed to finality.

Our counsel sees no reason to accelerate the System Board of Adjustment proceedings solely for the benefit of the Company, where, as here, the Company is likewise pressing crinimal charges against these two men. "Clearly, a more appropriate method of proceeding is to determine whether or not there was sufficient proof to warrant criminal prosecution in conformity with the strict rules of evidence rather than to permit the System Board of Adjustment proceedings to progress."

In addition, upon visiting Newark February 4 & 5, there was adequate indication to lead me to conclude that much research and extensive investigation needs to be done, particularly in relation to certain procedures and other goings-on concerned. . . .before the Barbossa and Gonzalez cases are to be heard before the System Board with minimum jeopardy to justice and equity.

Proceeding to the System Board at this time would not be for the benefit of Barbossa and Gonzalez.

Considering the Company had such confidence in its measures against Barbossa and Gonzalez, by not only discharging them from employment but also pressing criminal charges, what possible insecurity to the Company's position could there be wrought by delaying System Board of Adjustment hearings until criminal proceedings have been resolved?

Therefore, February 14 is not a 'practical' time for Dockets 73-22 and 73-23 to be heard before the Board.

During the time Mr. Steve Wheeler and I discussed, and as he says, agreed to requesting your services as the neutral mediator for Dockets 73-22 & 73-23 on February 14, it was emphasized that if Barbossa and Gonzalez were not inclined toward a System Board hearing on that date, we could substitute another docket, citing to Mr. Wheeler at least one by name and number.

In view of our lack of mutual agreement on Barbossa and/or Gonzalez for February 14, are you willing to proceed with an alternate docket, provided the Carrier agrees?

Respectfully & very sincerely,

Clarence B. Brown
General Chairman

CBB/jlg
opeiu #12

cc: S. Wheeler
L. Hesner
C. Barbossa
A. Gonzalez
W. Kozuch

APPENDIX B

005176C039 0953EDT
ZCZC 001 PD St. Paul Minnesota
PMS Burton B. Turkus
595 Madison Ave.
New York, New York 10002
BT

We are in receipt of letter from IAM Chairman C. B. Brown dated 2/6/74 requesting postponement of 2/14/74 hearing. Please consider this as our vigorous objection to the union request. The hearing date has been known for months. The union advised that Mr. Gonzalez approved of the 2/14/74 date, and the company is prepared to present its case. Mr. Barbossa's case was to be heard as soon as possible after 2/14/74. The unions request is untimely and obviously the result of their failure to start preparation of their case until 2/4/74. The company has not "pressed" charges against the two former employees but have merely cooperated with law enforcement officials who initiated the charges. In addition the company never agreed to substituting any other cases. To so do at this late date would prejudice the company's preparation. If the unions request for continuance is to be considered by you then the company moves the board for a ruling that no claim by the grievants for back wages or benefits will be valid or collectible for the period after 2/14/73.

Steven D. Wheeler—Labor Relations Attorney

NNNN

Accepted

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